89-1597

Supreme Court, U.S.
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No. ___

In The

Supreme Court of the United States

October Term, 1989

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORP. LTD.

Petitioner,

vs.

I.T.T. GENERAL CORPORATION
AND
ELECTRONICS CORP. OF AMERICA

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. May a Federal court ignore the explicit standard of a State intermediate appellate court when The Federal Court's previous opinions direct that "the decisions of the state's intermediate appellate courts are to be given proper regard . . . "? *Erie Castings Co. vs. Grinding Supply, Inc.*, 736 F2d 99 (1984); *Erie Railroad Co. vs. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION IN THE COURT BELOW 1

JURISDICTION 1

FEDERAL CASE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

INTRODUCTION 3

1. CONTRIBUTION IN AN EQUITABLE FAULT SHARING MECHANISM AND IS NOT A CONTRACTUAL CAUSE OF ACTION 3

2. INDEMNITY IS A FAULT SHIFTING MECHANISM AND NOT A CONTRACTUAL CAUSE OF ACTION 6

3. GABRIEL vs. O'HARA AND THE "CATCH ALL" SIX YEAR STATUTE OF LIMITATIONS 8

CONCLUSION 11

APPENDICES

Appendix A: Order of the United States Court of Appeals for the Third Circuit...App. 1

Appendix B: Opinion of the United States District Court for the Eastern District of Philadelphia.....App. 3

TABLE OF CONTENTS – Continued

Page

Appendix C: Order on Petition for Rehearing from the United States Court of Appeals for the Third Circuit.... App. 11

TABLE OF AUTHORITIES

Page

CASES

A. J. Cunningham Packing vs. Congress Financial Corp. 792 F2d 330 (3rd Cir. 1986).....3, 11

Boyle vs. United Technologies Corp. 487 U.S. ___, 101 L.Ed.2d 442, 108 S.Ct. ___ (1988)..... 11

Erie Castings Co. vs. Grinding Supply Inc. 736 F2d 99 (3rd Cir. 1984)..... 3

Erie R. Co. vs. Thompkins 304 U.S. 64, 62 L. Ed 1188, 58 S.Ct. 817 (1938).....2, 11

Frangos vs. Doering Equipment Corp. 806 F2d 70 (3rd Cir. 1988)..... 10

Gabriel vs. O'Hara 534 A2d 488 (Pa. Super 1987) 3, 6, 8, 9, 10, 11, 12

Ledford vs. Central Medical Pavilion 90 F.R.D. 445 (W.D. Pa. 1981)..... 2

Mattia vs. Sears, Roebuck & Co. 531 A2d 789 (Pa. Super 1987) 3, 5

McGowan vs. University of Scranton 759 F2d 287 (3rd Cir. 1985)..... 3

McKenna vs. Ortho Pharmaceutical Corp. 622 F2d 657 (3rd Cir. 1980)..... 12

Pa. Nat. Mutual Ins. vs. Nicholson 542 A2d 123 (Pa. Super 1988).....10, 11, 12

Puller vs. Puller 110 A2d 175 (Pa. 1955)..... 6

Sirianni vs. Nugent Bros. Inc. 506 A2d 868 (Pa. 1986)..... 6

Svetz vs. Land Tool Co. 513 A2d 403 (Pa. Super 1986)..... 2, 5, 6

TABLE OF AUTHORITIES – Continued

Page

Thermo King Corp. vs. Strick Corp. 467 F. Supp. 75 (W.D. Pa. 1979) 10

Wilson vs. Asten-Hill Mfg. Co. 791 F2d 30 (3rd Cir. 1986) 3

STATUTES AND RULES

42 Pa. C.S.A. 5524 11

42 Pa. C.S.A. §8321 et seq 9

73 P.S. §201 et seq 8

F.R.C.P. No. 17 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINION IN THE COURT BELOW

The Order of the U.S. Court of Appeals for the Third Circuit is reproduced as Appendix A. The opinion of the United States District Court for the Eastern District of Pennsylvania are reproduced as Appendix B.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit was entered on December 21, 1989. A Petition for Rehearing en banc was denied on January 17,

1990. (Appendix C). This petition was filed within ninety days of that date, the Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. §1254(1).

FEDERAL CASE INVOLVED

Erie Railroad Company vs. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed 1188 (1938)

STATEMENT OF THE CASE

Briefly, Stanley Masztak instituted an action against Louis Nardello in Philadelphia Court of Common Pleas December Term, 1971 No. 2204. Louis Nardello Inc. had been engaged to service an oil burning heating unit which exploded and allegedly injured Mr. Masztak.

Consequently, General Accident was ordered to indemnify Nardello and as the real party in interest, General Accident filed the present action against I.T.T. General Corporation and Electric Corporation of America (see F.R.C.P. 17; *Ledford vs. Central Medical Parition*, 90 F.R.D. 445 (W.D. Pa. 1981).

There appears never to have been any contractual relationship between Nardello and I.T.T. or Nardello and Electronics Corporation. (see *Svetz vs. Land Tool Co.*, 513 A2d 403.)

The District Court concluded that because contribution and indemnity actions are contractual in nature the

four year statute of limitations applied and General Accident's action was time barred.

The panel affirmed the District Court's decision on December 21, 1989. The panel denied a petition for reconsideration on January 17, 1990.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The District Court's ruling that the statute of limitations period for contribution and indemnity actions is four not six years is a disregard for the Pennsylvania Superior Court decision of *Gabriel vs. O'Hara*, 534 A2d 488 (Pa. Super 1987) which explicitly states that a cause of action without a specific limitations period is governed by the six year "catch all" limitation period.

Further by ignoring the case of *Gabriel vs. O'Hara*, the District Court and now the panel has violated the principle that a Federal tribunal must give the decisions of state intermediate appellate courts "proper regard". See *Erie Castings Co. vs. Grinding Supply Inc.*, 736 F2d 99 (3rd Cir. 1984); *McGowan vs. University of Scranton*, 759 F2d 287 (3rd Cir 1985); *Wilson vs. Asten-Hill Manufacturing Co.*, 791 F2d 30 (3rd Cir. 1986); *A.J. Cunningham Packing vs. Congress Financial Corp.*, 792 F2d 330 (3rd Cir. 1986).

1. CONTRIBUTION IS AN EQUITABLE FAULT SHARING MECHANISM AND IS NOT A CONTRACTUAL CAUSE OF ACTION

In *Mattia vs. Sears, Roebuck & Co.*, 531 A2d 789 (Pa. Super 1987), the Superior Court explained the concept of Contribution:

"At common law, there was no right of contribution between joint tortfeasors, See *Leflar,* Contribution and Indemnity Tortfeasors, 81 U.Pa.L.Rev 130 (1932). Even if two parties were equally responsible for the plaintiff's injury, one could be held liable for the entire loss while the other went scot free. Id. This inequitable result was universally criticized and eventually was changed via statute. See Prosser, Law of Torts 306-07 (4th ed. 1971); Uniform Contribution Among Tortfeasors Acts, 42 Pa. C.S.A. §§ 8321-27.

In Pennsylvania, the statute provides for a right of contribution among joint tortfeasors. 42 PA. C.S.A. §8324(a). Joint tortfeasors are defined as "two or more persons jointly or severally liable for an injury if their conduct "cause a single harm which cannot be apportioned . . . even though [the actors] may have acted independently." *Capone vs. Donovan,* 332 Pa. Super 185, 189, 480 A2d 1249, 1251 (1984)." 531 A2d at 791

The Court on to State:

"[1] Under the Act, joint tortfeasors are entitled to contribution if they have paid more than their pro rate share of this common liability. 42 Pa. S.C.A. § 8324(b). Contribution is obtainable even if the two defendants are held liable based upon different theories of recovery. *Svetz for Svetz vs. Land Tool Co.,* 533 Pa. Super 230, 238, 513 A2d 403, 407 (1986); *Rabatin vs. Columbus Lines, Inc.,* 790 F2d 22, 25 (3d Cir. 1986).

In *Svetz,* a trustee ad litem sued in strict liability for damages arising from a fatal motorcycle accident on behalf of a decedent, alleging that a defective helmet had caused the death.

> The defendant-manufacturer joined as an additional defendant, the tavernkeeper who allegedly served alcohol to the decedent prior to the accident, seeking contribution based upon negligence. The trial court dismissed the complaint for contribution, ruling that such a claim does not lie if the theory of recovery differs from the underlying theory of the case. The Superior court reversed, holding that a defendant held liable based upon strict liability may be entitled to contribution from a negligent third party. The court stated that "the doctrine of contribution is based on equity. Therefore, the Act must be examined with equity in mind" Svetz, 355 Pa. Super. at 237, 513 A2d at 407. The court then stated: "It matters not on which theory a tortfeasor has been held responsible for the tort committed against the plaintiff. So long as the party seeking contribution has paid in excess of his or her share of liability, it would be inequitable under the Act to deny that party's right to contribution from a second tortfeasor who also contributed to the plaintiff's injury." Id. at 238, 513 A2d at 407. 531 A2d at 791
>
> [2] Thus, the equitable obligation of contribution may be asserted where: (1) the parties combined to produce the plaintiff's injury; (2) the parties are each liable in tort to the plaintiff; and (3) a tortfeasor has discharged the common liability by paying more than his pro rate share . . . " 531 A2d 791

Nowhere in the *Mattia* case is contribution called a contractual cause of action. Also, the *Svetz* case (cited in *Mattia*) showed that contribution does not arise from contractual relations. In *Svetz* a helmet manufacturer and bar were never in a contractual relationship. *Svetz vs. Land Tool Co.*, 513 A2d 403 (Pa. Super 1986).

The *Svetz* Court quoted the case of *Puller vs. Puller,* 110 A2d 175 (Pa. 1955) by stating:

> "The Supreme Court observed that 'contribution is not a recovery for the tort [committed against the plaintiff] but the enforcement of an equitable duty to share liability for the wrong done' . . . " 513 A2d at 407

So if Contribution is an equitable principle what is its statute of limitations period? The case of *Gabriel vs. O'Hara,* 534 A2d 488 (Pa. Super 1987) should answer that question, but first what is indemnity?

2. INDEMNITY IS A FAULT SHIFTING MECHANISM AND NOT A CONTRACTUAL CAUSE OF ACTION

In *Sirianni vs. Nugent Bros. Inc.,* 506 A2d 868 (Pa. 1986), the Pennsylvania Supreme Court described indemnity in the following manner:

> "As the Superior Court correctly noted, the concept of common law indemnity in Pennsylvania was summarized by this Court in the case of *Builders Supply Co. vs. McCabe,* 366 Pa. 322, 77 A.2d 368 (1951). There this court, speaking through Mr. Justice Horace Stern, described the right of indemnity thusly:
>
> > The right of *indemnity* rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault of his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for

> which he himself is only secondarily liable . . .
>
> Id at 325, 77 A.2d at 370 (emphasis in original).

Although some legal commentators have suggested that the need for common law indemnity has dissipated with the modern day acceptance of the theories of comparative negligence and contribution, Prosser and Keaton of Torts p. 344 (5th Ed. 1984); in Pennsylvania our legislature has specifically decided that the acceptance of contribution "does not impair any right of indemnity under existing law". 42 Pa.C.S. §8323. Thus, the law of *Builders Supply* remains viable today. However, the adoption of those modern day fault sharing mechanisms can aid in fully understanding what this Court meant in *Builders Supply*.

In further explaining the right of indemnity, the Court said:

> [The difference between primary and secondary liability] depends on a difference in the character or *kind* of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person.
>
> . . . .
>
> [S]econdary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.
>
> Id at 326, 328, 77 A2d at 370, 371 (emphasis in original). See also *Burbage vs. Boiler*

Engineering & Supply Co., 433 Pa. 319, 249 A2d 563 (1969)." 506 A2d at 870-871

The Supreme Court went on to state:

> "Thus, unlike comparative negligence and contribution, the common law right of indemnity is not a fault sharing mechanism between one who was predominantly responsible for an accident and one whose negligence was relatively minor. Rather, it is a fault shifting mechanism, operable only when a defendant who has been held liable to a plaintiff solely by operation of law, seeks to recover his loss from a defendant who was actually responsible for the accident which occasioned the loss . . . " 506 A2d at 871

If Indemnity is not specifically a contractual cause of action, then what is its statute of limitations period? This can best be answered in *Gabriel vs. O'Hara*, 534 A2d 488 (Pa. Super 1987).

3. *GABRIEL VS. O'HARA* AND THE "CATCH ALL" SIX YEAR STATUTE OF LIMITATIONS PERIOD

Gabriel vs. O'Hara, supra, involved the sale of a residential property on or about August 29, 1980. The plaintiffs later learned of substantial defects and filed an action on August 25, 1982. Later on July 28, 1986, the plaintiffs filed a petition for leave to amend their complaint for violation of the Unfair Trade Practices and Consumer Protection Law (UTPCPL) (73 P.S. §201 et seq). The petition was denied and the plaintiffs appealed.

Because the action involved a sale, allegations of fraud and a consumer contractual relationship the Court could have found that the six year limitation period did not apply.

The *Gabriel* court noted that the legislature "failed to include a statute of repose for either actions for damages or injunctive relief under section 201-9.2" of UTPCPL (534 A2d at 493 Col 1).

The *Gabriel* court ruled that the six year limitation applied:

> "As we previously noted, the Unfair Trade Practices and Consumer Protection Law embraces actionable conduct which sounds in assumpsit as well as trespass and which parallel actions upon contracts as well as those arising in tort. We are unable, therefore, to characterize all the multifarious claims that may be brought under the UTPCPL as "fraud" or "deceit." Instead, the UTPCPL creates a civil action which is separate and distinct from appellants' other causes of action and for which the legislature provided no limitations period. The language of section 5527(6) of the Judicial Code, however, is clear and unambiguous as to what period of limitation shall apply in such instances: "Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation [must be commenced within six years]." 42 P.C.S. § 5527 (6) (emphasis added). Since section 201-9.2 of the UTPCPL provides for a civil action which is not subject to a limitations period, the Unfair Trade Practices and Consumer Protection Law is subject to the six-year "catch all" statute of limitations. We find further support for our determination in the decisions of the courts of other states which have concluded likewise." 534 A2d at 495

It should be noted that contribution and indemnity actions may involve either contract or tort issues; that the Uniform Contribution among Tortfeasors Act 42 Pa.

C.S.A. §8321-27 does not have a specific statute of limitations period; that neither contribution nor indemnity are specifically given a limitations period of two or four years and finally cases such as *Pa. National Mutual Insurance vs. Nicholson*, 542 A2d 123 (Pa. Super 1988); *Frangos vs. Doering Equipment Corp.*, 860 F2d 70 (3rd Cir. 1988) and *Thermo King Corp. vs. Strick Corp.*, 467 F. Supp 77 (W.D. Pa. 1979) have lead many to believe that the statute of limitations for contribution and indemnity is six years.

Using the *Gabriel* standard it would appear that the statute of limitation *is* six years for contribution and indemnity actions.

There has been no explicit change in the law reducing contribution and indemnity actions from six years to four years limitations period in fact, in *Nicholson* the Superior Court stated:

> "Because a contribution action is not specifically named within a particular limitations statute, the applicable statute of limitations is §5527. See 42 Pa. C.S.A. §5527. Accordingly, in an action for contribution, the applicable limitation period is six years commencing from the entry of judgment against the joint tortfeasors . . . " 542 A2d at 126

The court *never* qualified this statement by declaring that it applies only to actions before 1982.

The *Frangos* court also declared that the statute of limitations for indemnity is six years and cited *Thermo King*. (see 860 F2d at 75 n 6).

CONCLUSION

One of the defense briefs admitted that there was no explicit case law declaring that the statute of limitations for contribution and indemnity is six years. Rather the defendant claimed that the law *implys* that these actions are subject to a four year limitations.

Nicholson explicitly states that the limitations period is six years, but this case was rejected by the District Court because it arose before a 1982 change in the law and by implication the period is now four years even though the *Nicholson* court does not make such a declaration.

The limitations statutes specifically name causes of action (i.e. fraud) and those not *specifically* named fall under the "catch all" six year limitations. This interpretation was followed in the *Gabriel* case.

The statute of limitations for Contribution and Indemnity is six years until explicitly changed as in the case with fraud and deceit (see 42 Pa. C.S.A. 5524, 1978 and 1982; *A.J. Cunningham Packing vs. Congress Financial Corp.*, 792 F2d 330 (3rd Cir. 1986)).

In the case of *Boyle vs. United Technologies Corp.*, 487 U.S. ___, 101 L.Ed.2d 442, 108 S.Ct. ___ (1988) Justice Brennan in his dissent discussed the standard of *Erie R. Co. vs. Thompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938):

> Thus, Erie was deeply rooted in notions of Federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal common law . . . 101 L. Ed.2d at 461

In the present action a District Court Judge found that the Statute of Limitations had been reduced from six to four years. Yet the Pennsylvania Superior Court in *Pa. Nat. Mutual Ins. vs. Nicholson,* 542 A2d 123 (Pa. Super 1988) did not make such a pronouncement. In fact if the standard found in *Gabriel vs. O'Hara,* 534 A2d 488 (Pa. Super 1987) was followed, the Court would have been compelled to deny the defendant's motion for summary judgment.

In *McKenna vs. Ortho Pharmaceutical Corp.,* 622 F2d 657 (3rd Cir. 1980) the Court stated in footnote 14:

> "14 *Commissioner vs. Estate of Bosch,* 387 U.S. 456, 465, 87 S. Ct. 1776, 1783, 18 L.Ed2d 886 (1965) "If there be no decision by that Court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the state." *Id* The *Erie* court expressly intended that federal courts were to be governed by the law of each state whether it "be declared by its legislature or by its highest court in a decision . . . " 622 F2d at 661 footnote 14

The *McKenna* Court further stated:

> "A diversity litigant should not be drawn to the federal forum by the prospect of a more favorable outcome that he could expect in the state courts. But neither should he be penalized for his choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show . . . " 622 F.2d at 663.

In the present case, if the District Court Judge had followed the clear standard in *Gabriel vs. O'Hara,* 534 A2d 488 (Pa. Super 1987) "predicting" Pennsylvania law should not have been a problem.

Because it is clear that the District Court Judge may not have followed U.S. Supreme Court Standards, the plaintiff requests the petition for a Writ of Certiorari should be granted and the decision of the U.S. District Court and the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: April 9, 1990

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-1596

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORP. LTD.,

Appellant

v.

I.T.T. GENERAL CORPORATION and
ELECTRONICS CORPORATION OF AMERICA

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil No. 88-6505
District Judge: Honorable James McGirr Kelly

Submitted Under Third Circuit Rule 12(6)
December 11, 1989

Before: HUTCHINSON, COWEN, and ROSENN,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ Max Rosenn
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: DEC 21 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORP., LTD.	:	CIVIL ACTION
v.	:	
I.T.T. GENERAL CORPORATION and ELECTRONICS CORP. OF AMERICA	:	NO. 88-6505

MEMORANDUM AND ORDER

J. M. KELLY, J. JUNE 30, 1989

Presently before the court is the motion of defendant I.T.T. General Controls Division (ITT), referred to as ITT General Corporation in plaintiff's complaint, for summary judgment in favor of defendants and against plaintiff General Accident Fire & Life Assurance Corp., Ltd. (General Accident). Defendant Electronics Corp. of America (ECA) has filed a motion for judgment on the pleadings or, in the alternative, for summary judgment. Each defendant has responded to the other's motion in support of the averments and arguments set forth in the motions. The court concludes that ITT's motion for summary judgment in favor of both defendants shall be granted. Both defendants are entitled to judgment as a matter of law on the ground that plaintiff's claim is barred by the applicable statute of limitations.

BACKGROUND

There is no genuine issue as to the following material facts. In 1969, Stanley Masztak was allegedly injured by

an explosion of an oil burner heating unit, and subsequently instituted an action in Philadelphia Common Pleas Court against six defendants, including Louis Nardello Co., Inc. (Nardello), based on that injury. On June 16, 1983, judgment was entered in favor of Masztak and against Nardello in the amount of $399,479.17.[1]

Nardello initiated an action against General Accident in 1981, seeking a declaration of its rights and General Accident's obligations, regarding the Masztak litigation, under an insurance policy between Nardello and General Accident. Summary judgment was entered in favor of Nardello and against General Accident in the declaratory judgment action on April 7, 1983. General Accident was required to indemnify Nardello for the amount recovered by Masztak, and for costs, counsel fees and interest. General Accident paid Nardello the amount of $630,142.21 on October 2, 1987, after an unsuccessful appeal of the trial court's summary judgment order.

General Accident seeks to recover the amount of $630,142.21 from ITT and ECA. In its complaint, General Accident alleges that the oil burner heating unit which exploded and injured Masztak contained components which were manufactured by ITT and ECA, that these components were defectively designed, and that the defective components caused the explosion which injured Masztak. General Accident also alleges that negligence of ITT and ECA caused the explosion and injury.

---

[1] Masztak and Nardello subsequently entered into a settlement agreement, pursuant to which Nardello made installment payments on the judgment amount from October 7, 1983 until October 8, 1987.

DISCUSSION

ITT, in its motion for summary judgment in favor of both defendants, contends that General Accident's claim against the defendants is barred by the applicable statute of limitations. ITT contends that General Accident's claim is properly characterized as a claim of subrogation to the rights of its insured, Nardello. ITT further contends that Nardello's claim against ITT and ECA is a claim for contribution, based on the theory that ITT and ECA were joint tortfeasors, or for indemnity. ITT contends that the underlying claim of Nardello for contribution or indemnity accrued when judgment was entered against Nardello, on June 16, 1983. Accordingly, because General Accident filed its complaint on August 23, 1988, over five years after the underlying claim accrued, General Accident's claim is barred pursuant to either the two year or four year Pennsylvania statute of limitations.

In response, General Accident contends that the statute of limitations applicable to its subrogated claim for contribution or indemnity is six years, and that such a claim accrues only when the party seeking contribution has paid the entire judgment or more than its pro rata share. Additionally, General Accident contends that it has an independent claim for indemnity, to recover its payment to Nardello of counsel fees Nardello incurred in defending Masztak's claim, and that this claim for indemnity did not accrue until General Accident's payment to Nardello.

I conclude that General Accident has no independent right of indemnity or contribution against ITT or ECA. Indemnity principles do not apply between an insurer,

General Accident, and unrelated alleged tortfeasors such as ITT and ECA. *See David Jeffrey, Ltd. v. Jewelers Mutual Insurance Co.*, No. 86-6222, slip op. (E.D. Pa. Aug. 29, 1987), 1987 U.S. Dist. LEXIS 8072, 4-5. The insurer's rights are established by the right of subrogation to the rights of the insured. *Id.* In this action the insured, Nardello, would have the right to recover attorney's fees expended in defense of the Masztak claim, as indemnitee, even where those costs have been paid by the insurer, General Accident. *See Boiler Engineer and Supply Co. v. General Controls, Inc.*, 443 Pa. 44, 277 A.2d 812 (1971).

Similarly, General Accident has no independent right of contribution against ITT or ECA. General Accident and the two defendants cannot be considered joint tortfeasors, a prerequisite to the assertion of a claim for contribution, because General Accident and the two defendants have not acted together in causing the loss of the original plaintiff, Masztak, nor have their independent acts united to cause such a loss. Contribution is a right enjoyed by a joint tortfeasor, and since General Accident is not a joint tortfeasor, it has no such independent right. *See Jeffrey*, 1987 U.S. Dist. LEXIS 8072 at 3-4.

General Accident's subrogated claim for indemnity or contribution is an assertion of the right of Nardello, its insured, against the alleged tortfeasors ITT and ECA. Therefore, General Accident is subject to whatever defenses ITT and ECA have against Nardello. *See id.* at 5-6. ITT contends that the applicable statute of limitations bars General Accident's claim. I conclude that the statute of limitations which governs General Accident's action is the four year statute applicable to contracts implied in law. 42 Pa. Cons. Stat. Ann. § 5525(4) (Purdon 1981).

An action for contribution or indemnity is most properly characterized as an action based on a contract implied by law. *See Svetz v. Land Tool Co.*, 355 Pa. Super. 230, 238, 513 A.2d 403, 407 (1986) (contribution is enforcement of equitable duty), *appeals denied*, 515 Pa. 581, 527 A.2d 542, 515 Pa. 584, 527 A.2d 544 (1987); *Thermo King Corp. v. Strick Corp.*, 467 F. Supp. 75, 77 (W.D. Pa.) (due to contractual nature, indemnity claim governed by statute of limitations applicable to contracts), *aff'd*, 609 F.2d 503 (3d Cir. 1979). In *Pennsylvania National Mutual Casualty Insurance Co. v. Nicholson Construction Co.*, 374 Pa. Super. 13, 542 A.2d 123, *appeal denied*, 555 A.2d 116 (1988), the court noted that an action for contribution "sounds in contract rather than tort law." *Id.* at 18, 542 A.2d at 125.[2]

General Accident concedes that an action for contribution is contractual in nature. Moreover, General Accident states in its memorandum of law that:

> an action for contribution is 'held to be governed by the statute of limitations applicable to actions based on implied contracts since, for purposes of limitations, the action may be regarded as one for the debt not evidenced by

---

[2] In *Nicholson*, the court ruled that the six year statute of limitations governed the claim for contribution presented in that case. The action in *Nicholson* had accrued in 1977, however, prior to the effective date of the amendment to 42 Pa. Cons. Stat. Ann. § 5525 which established a four year statute of limitations period for actions based on contracts implied in law. Moreover, in *Nicholson* the parties conceded that the six year statute of limitations applied, and almost eight years had passed between the accrual of the cause of action and the date the complaint was filed. *See Nicholson*, 374 Pa. Super. at 19-20, 542 A.2d at 126.

> writing, or as one to recover, upon an implied promise, money paid for the defendant's benefit.'

Memorandum of Law in Support of Plaintiff's Answer to Motion for Summary Judgment at 7 (citation omitted).

The date on which General Accident's claim for contribution or indemnity accrued is the date on which the underlying claim of its insured, Nardello, accrued. A claim for contribution or indemnity accrues, and the statute of limitations begins to run on such a claim, when a judgment is entered in favor of the plaintiff in the original action. *See Nicholson*, 374 Pa. Super. at 19, 542 A.2d at 126; *Hughes v. Pron*, 286 Pa. Super. 419, 426, 429 A.2d 9, 12 (1981). Judgment was entered in favor of Masztak, the original plaintiff, and against Nardello, on June 16, 1983. The statute of limitations began to run on the claim for contribution or indemnity, therefore, on June 16, 1983.[3]

---

[3] General Accident contends that the statute of limitations on an action for contribution does not begin to run until the joint tortfeasor seeking contribution pays more than his pro rata share of the liability. General Accident further contends that the existence of the factual issue of the proper allocation of the pro rata share of the liability between Nardello and the defendants in this action precludes an entry of summary judgment based on the statute of limitations.

These contentions must be rejected. If the statute of limitations does not begin to run on a claim for contribution until the proper allocation of the pro rata shares of the joint tortfeasors is determined, the result would be that the running of the statute would be tolled indefinitely until the actual determination of liability for contribution was made. Postponing the accrual of an action, for statute of limitations purposes, until the determination of the merits of the action is a result not required or justified under Pennsylvania law.

Because the statute of limitations began to run on General Accident's claim for contribution or indemnity on June 16, 1983, and the complaint in this action was filed on August 23, 1988, General Accident's claim is barred by the four year statute of limitations. Accordingly, defendants ITT and ECA are entitled to judgment as a matter of law.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORP., LTD.	:	CIVIL ACTION
v.	:	
I.T.T. GENERAL CORPORATION and ELECTRONICS CORP. OF AMERICA	:	NO. 88-6505

ORDER

AND NOW, this 30th day of June, 1989, for the reasons set forth in the foregoing Memorandum, it is ORDERED that:

1. The motion of defendant I.T.T. General Controls Division for summary judgment in favor of defendants is GRANTED.

2. Judgment is ENTERED in favor of defendants, I.T.T. General Controls Division and Electronics Corp. of America, and against plaintiff, General Accident Fire & Life Assurance Corp., Ltd.

3. The motion of defendant Electronics Corporation of America for judgment on the pleadings or in the alternative for summary judgment is DISMISSED as moot.

BY THE COURT:

/s/ James Kelly
JAMES McGIRR KELLY, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 89-1596

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CORP. LTD.,

Appellant

v.

I.T.T. GENERAL CORPORATION and
ELECTRONICS CORPORATION OF AMERICA

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civil No. 88-6505

Before: HUTCHINSON, COWEN, and ROSENN,
Circuit Judges

ORDER SUR PETITION FOR PANEL REHEARING

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

By the Court:

/s/ Max Rosenn
Circuit Judge

Dated: JAN 17 1990

No. 89-1597

FILED
MAY 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CO.,
Petitioner,

v.

I.T.T. GENERAL CORPORATION

AND

ELECTRONICS CORP. OF AMERICA,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT I.T.T. GENERAL CORPORATION

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QUESTION PRESENTED FOR REVIEW

1. Did the courts below fail to give proper regard to the statutes and decisions of the appellate courts of Pennsylvania in holding that the Pennsylvania four year statute of limitations barred the insurance company petitioner's subrogated causes of action for contribution or indemnity for a judgment against its insured?

Listing Naming Affiliates of Respondent Corporation:

The correct name of respondent is ITT General Corporation. Respondent has no parent, subsidiary which is not a wholly owned subsidiary, or other affiliate within the meaning of Rule 28.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATUTES INVOLVED	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
A. THE COURTS BELOW WERE CORRECT IN ENTERING JUDGMENT AGAINST PETITIONER ON THE GROUND THAT ITS CLAIMS WERE BARRED BY THE FOUR YEAR PENNSYLVANIA STATUTE OF LIMITATIONS	5
B. THE COURTS BELOW DID NOT IGNORE ANY RELEVANT DECISION OF THE STATE COURTS	11
C. THERE IS NO SPECIAL OR IMPORTANT REASON WHY THIS COURT SHOULD GRANT THIS PETITION BECAUSE NO FEDERAL QUESTION IS INVOLVED AND THERE IS NO CONFLICT BETWEEN THE DECISION HERE AND ANY OTHER DECISION OF THE STATE OR FEDERAL COURTS ON THE QUESTION PRESENTED	12
CONCLUSION	14

TABLE OF AUTHORITIES

Cases: Page

Crisanti v. J.H. Beers, Inc., 297 Pa. Super. 337, 443 A.2d 1150, 1152 (1982) 6

Frangos v. Doering Equipment Corp., 860 F.2d 70 (3rd Cir. 1988) 10

Gabriel v. O'Hara, 368 Pa. Super. 383, 534 A.2d 488 (1987) 8, 10, 11-13

Mack Trucks Co., Inc. v. Bendix-Westinghouse Auto. A. B. Co., 372 F.2d 18, 20 (3rd. Cir. 1967) 7

Pa. Nat. Mut. Ins. v. Nicholson, 374 Pa. Super. 13, 542 A.2d 123 (1988), *appeal denied*, 555 A.2d 125 (1988) 6, 9, 10

Scetz v. Land Tool Co., 355 Pa. Super. 230, 513 A.2d 403, 407 (1986) 6, 10

Thermo-King Corp. v. Strick Corp., 467 F.Supp. 71 (W.D. Pa. 1979), *affirmed*, 734 F.2d 3, 9 (3rd Cir. 1984) 6

STATUTES

42 *Pa. C.S.A.* § 5524 ..... 5, 8-10

42 *Pa. C.S.A.* § 5525 ..... 5, 10

42 *Pa. C.S.A.* § 5527 ..... 5, 7, 9

42 *Pa. C.S.A.* § 201, *et seq.* 8

AUTHORITIES

18 Am. Jur. 2d, *Contribution*, § 1201, p. 105 (1954) 7

Pennsylvania Bar Association Judicial Code Explanation, 42 *Pa. C.S.A.* xv (1981) 7

STATUTES INVOLVED

Subchapter B, *Pennsylvania Consolidated Statutes Annotated* sections 5525(4) and 5527

42 *Pa. C.S.A.* § 5525:

> The following actions and proceedings must be commenced within four years:
>
> . . . .
>
> (4) An action upon a contract implied in law, except an action subject to another limitation specified in this Subchapter.

42 *Pa. C.S.A.* § 5527:

> Any civil action or proceeding which is neither subject to another limitation specified in this Subchapter . . . must be commenced within six years.

No. 89-1597

IN THE

Supreme Court of the United States

October Term, 1989

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CO.,
Petitioner,

v.

I.T.T. GENERAL CORPORATION

AND

ELECTRONICS CORP. OF AMERICA,
Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT I.T.T. GENERAL CORPORATION

STATEMENT OF THE CASE

An action for personal injuries suffered as a result of of an oil burner fire was brought against petitioner's insured (R.137a, R.171-3a) but petitioner disclaimed and refused to defend. (R.7-8a, R.229a). The insured thereupon instituted a declaratory judgment action against petitioner. R.8a. Judgment was entered against the insured in the personal injury action on June 21, 1983. R.141a.

Judgment was ultimately entered against petitioner in the declaratory judgment action requiring it to pay its insured $630,142, and that amount was paid by petitioner on October 2, 1987. R.241-2a; R.8-9a.

Petitioner then brought this action against Respondents on August 23, 1988, five years and two months after entry of the judgment against its insured, alleging that each of them manufactured and supplied defective components of the oil burner and that each was negligent in failing to provide adequate instruction with respect to its component, and seeking contribution or indemnity from respondents for the judgment against petitioner's insured and the R.9-11a.

The District Court entered summary judgment against petitioner and in favor of respondents on the ground that petitioner's claims were barred by the Pennsylvania four year statute of limitations applicable to an action upon a contract implied in law because those claims accrued upon entry of judgment against petitioner's insured in the underlying action more than five years before the commencement of this action. The District Court rejected petitioner's contention that the six year statute, applicable only to actions which are not subject to any other limitation, was the appropriate period of limitation. Opinion, App. pp.6-9. The District Court also rejected respondent's contention that petitioner's claims were also barred by the two year statute applicable to any action to recover damages for injury to person or property which is founded on negligence, intentional, or otherwise tortious conduct. *See* Opinion, App. p.5.

Petitioner appealed, and the United States Court of Appeals for the Third Circuit entered a Judgment Order affirming the District Court without oral argument or opinion on December 21, 1989. App. pp.1-2.

Petitioner's Petition for Rehearing, filed on January 3, 1990, was denied by the Circuit Court on January 19, 1990. Order, App. pp 11-12. This Petition for a Writ of

Certiorari was filed April 9, 1990 and received by Respondent on April 9, 1990.

Petitioner seeks this Court's intervention by asserting that the courts below ignored a decision of the Pennsylvania intermediate appellate court in holding that the four year limitation period applied to bar petitioner's claims. Respondent contends that the courts below were correct in holding that petitioner's claims were barred by the Pennsylvania statute of limitations, and that the decision which petitioner claims was improperly ignored is not applicable to this case and was not ignored by the courts below because it was not cited to them until after this judgment was affirmed on appeal.

SUMMARY OF ARGUMENT

The Circuit Court was correct in affirming the District Court's entry of summary judgment against petitioner on the ground that petitioner's subrogated claims for contribution or indemnity for a judgment against its insured were barred by that section of the Pennsylvania statute which provided a four year period of limitations or an action upon a contract implied in law. The judgment entered was in accord with the statute and the language of prior decisions of the federal and state courts, and was not in conflict with any decision of a similar issue. Petitioner conceded in the courts below that its action was one based upon a contract implied in law to which the four year limitation applied.

The opinion of the District Court shows that all of the arguments and authorities relied upon by petitioner here were considered, and rejected.

Petitioner asserts as the only ground for review by this Court that the Courts below failed to have proper regard for the decision of an intermediate state appellate court which was never cited to the District Court and not cited to the Circuit Court until after this judgment was

affirmed, and which did not involve the section of the statute held to be applicable here.

There is no special or compelling reason why this Court should exercise its discretion to review this case, and this Petition should be denied.

ARGUMENT

A. THE COURTS BELOW WERE CORRECT IN ENTERING JUDGMENT AGAINST PETITIONER ON THE GROUND THAT ITS CLAIMS WERE BARRED BY THE PENNSYLVANIA FOUR YEAR STATUTE OF LIMITATIONS.

Subchapter B of the Judicial Code, effective in June of 1978, codified the then existing statutes of limitation and modified them by removing causes of action based upon a written contract from the six year statute, 42 *Pa. C.S.A.* § 5527, and placing such causes of action within the four year period of 42 *Pa. C.S.A.* § 5525, by adding new sub-section 5525(3) including oral contracts within the four year limitation period, and by adding new sub-section 5525(4) which is at issue here and which provided that actions on a contract implied in law were within the four year limitation period.

The Judicial Code was then amended in 1982, effective in February of 1983, by adding a new subsection (7) to section 5524 which included in those causes of action to which the two year limitation applied any actions to recover damages for injury to person or property founded upon negligence, intentional, or otherwise tortious conduct, including deceit and fraud, except an action which was subject to another period of limitation specified in Subchapter B. The 1983 amendment also removed all of the previously specified actions which had been within the six year period under section 5527 to other sections and left section 5527 to apply only to actions which did not fall within any of the other provisions of the Subchapter.

The purposes of the revision of the statutes of limitations effected by the Judicial Code in 1978 and the 1983 amendment were to further the policy of applying shorter periods of limitation to claims which were dependent upon oral testimony and factual evidence which is subject to loss through lapse of time and diminution of memory, and to apply the same period of limitation to actions based upon similar facts, and to establish a single period of limitation for related actions whenever possible. *Crisanti v. J.H. Beers, Inc.*, 297 Pa. Super. 337, 443 A.2d 1150, 1152 (1982); see The Pennsylvania Bar Association Judicial Code Explanation, 42 Pa.C.S.A. xv (1981).

Although no Pennsylvania appellate court has yet had occasion to consider the application of the Judicial Code provision that contracts implied in law were subject to the four year statute of limitation, the Superior Court of Pennsylvania has treated an action for contribution which accrued before the effective date of the Judicial Code as one "which sounds in contract rather than tort law." *Pa. Nat. Mut. Ins. v. Nicholson*, 374 Pa. Super. 13, 542 A.2d 123 (1988), *appeal denied*, 555 A.2d 125 (1988). The District Court properly considered the Superior Court's treatment. Opinion, App. p. 7.

In *Thermo-King Corp. v. Strick Corp.*, 467 F.Supp. 71 (W.D. Pa. 1979), *affirmed*, 734 F.2d 3, 9 (3rd Cir. 1984), the court held that a counter-claim for indemnity for settlement of a strict liability claim for a defective product was contractual in nature. In *Svetz v. Land Tool Co.*, 355 Pa. Super. 230, 513 A.2d 403, 407 (1986), the court concluded that contribution was enforceable as an equitable duty. In *Mack Trucks Co., Inc. v. Bendix-Westinghouse Auto. A. B. Co.*, 372 F.2d 18, 20 (3rd. Cir. 1967), the court held that a claim for contribution to a settlement of a strict liability claim was subject to the Florida statute of limitation applicable to an action upon a contract not founded upon an instrument in writing

and was therefore barred. The District Court properly considered the reasoning of these cases in reaching its decision.

Petitioner conceded in the District Court that its claims for contribution and indemnity were subject to the statute of limitations applicable to contracts implied at law, but simply ignored the change made by the Judicial Code in placing such claims within the four year statute, arguing in its Memorandum of Law in opposition to Motion for Summary Judgment:

> Thus, in the absence of a particular statute specifying the statute of limitations for an action in contribution, an action in contribution is 'held to be governed by the statute of limitations applicable to actions based on implied contracts,' since, for the purposes of limitations, the action may be regarded as one for the debt not evidenced by writing, or as one to recover, upon an implied promise, money paid for the defendant's benefit.' 18 Am. Jur. 2d, *Contribution*,
>
> § 101 at 105 1974.
>
> Under Pennsylvania Law, this falls within the six year statute. 42 *Pa. C.S.A.* § 5527.

Memorandum of Law, pp. 7-8.

The District Court properly noted the concession that petitioner made before that court. Opinion, App. pp. 7-8.

Petitioner also conceded in the Circuit Court that its claim was based upon " an implied contract of indemnity." (Brief, p. 7) and that it ". . . is an implied contract of indemnity which lies at the heart of this case." Brief on Appeal, pp.9-10.

Petitioner cites no valid authority for the proposition that the six year limitation period of section 5527 is applicable. Petitioner relies here chiefly upon the Pennsylvania Superior Court decision in *Gabriel v. O'Hara*,

368 Pa. Super. 383, 534 A.2d 488 (1987), but that case is not authority for application of the six year limitation period here. In the *Gabriel* case, the court held that the trial court erred in dismissing a complaint under The Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 *Purd. Stat. Ann.* § 201 *et seq.*) on the ground that the facts averred most closely resembled an action for fraud or deceit which was subject to a two year limitation under sub-section (7) of the two year statute, section 5524. The Superior court concluded that sub-section (7) could not be applicable because, as part of the 1982 amendment effective in February of 1983, it was not applicable to the causes of action which accrued in 1980. The court then rejected the contention that the factual bases for the claims averred should be examined and the period of limitation applicable to each claim averred should be applied separately, holding that only one period of limitation was to be applied to all of the multifarious claims which could be made under the act. The court then concluded that because all of the claims potentially viable under the act could not be characterized as fraud or deceit and because the act created a multitude of separate and distinct claims and prescribed different types of remedies without providing for any limitation period, the six year 'catch-all' provision should be chosen as the applicable one in order to effectuate the broad remedial policies of the legislature in enacting the Act and to ensure that consumers injured by unfair or deceptive practices may pursue their rights under the Act.

That decision does not in any way apply here, where there is no claim under any statute covering a wide variety of types of claims and prescribing different types of remedies for them. The claims here are claims firmly rooted in common law, and are the subject matter of the Judicial Code and its amendments which constitutes the statute governing the periods of limitation which are to be applied to such claims. Moreover here the statute

directs that the court look to the basis of the action by providing that the four year period is applicable to "an action *upon* a contract implied in law" (§ 5525(4)), or any action which is *founded on* negligence, intentional or otherwise tortious conduct or any other action or proceeding *sounding in* trespass, including deceit or fraud (§ 5524(7)).

Petitioner's reliance upon the other cases it cites is also misplaced. In *Pa. Nat. Mut. Ins. v. Nicholson Const., supra*, the court held that an employer's cause of action for contribution against a tortfeasor which had caused personal injury to an employee arose at the time judgment for contribution for compensation payment was entered in 1977 rather than when the employee's compensation claim was reinstated and the employer made additional payments in 1984, and that an action brought in 1985 eight years after it accrued in 1977 was therefore barred. The appropriate period of limitation was not at issue; all parties agreed that the the six year period was the applicable one. 542 A.2d at 126. Moreover, the six year period was the correct period since the cause of action involved there accrued prior to the enactment of the Judicial Code and the new four year period for contracts implied in law established by section 5525(4) of the Judicial Code. The District Court correctly recognized the inapplicability of the *Nicholson* case. Opinion, App. p.7, footnote 2.

Petitioner relies upon a footnote *en passant in Frangos v. Doering Equipment Corp.*, 860 F.2d 70 (3rd Cir. 1988) in which the court summarily rejected the obviously insupportable contention that amendment of a cross-claim made in pending proceedings against a co-defendant which had settled was barred by the six year statute of limitations, in a case in which there had been no judgment of liability and the action against both defendants was still pending. The cause of action for contribution had not even accrued at the time that it was contended to have been barred.

The District Court properly considered and cited the *Nicholson* and *Svetz* cases and the petitioner's own arguments in reaching the correct conclusion that petitioner's claims for contribution and indemnity were subject to the four year period of limitation applicable to contracts implied in law and were therefore barred. The Circuit Court was correct in affirming the judgment against petitioner and this Petition should be denied.

B. THE COURTS BELOW DID NOT IGNORE ANY RELEVANT DECISION OF THE STATE COURTS.

The District Court's Opinion, App. pp. 3-9, considered and discussed all of the cases which petitioner cites to this Court in contending that the courts below erred in applying the four year statute of limitations to bar petitioner's claims except the *Gabriel* case. The District Court did not discuss that case because petitioner did not cite it to the District Court. The decisions relied upon or discussed by the District Court bearing on the issue which it decided were all cases applying state law, and the District Court applied the state statute. The Opinion shows on its face that the District Court ought to and did apply state law.

The Circuit Court affirmed by Judgment Order, stating that it considered the contentions raised by petitioner, but without opinion. App. pp. 1-2.

There is no basis for the petitioner's present contention that the courts below ignored the governing state statutes or decisions where all of the decisions cited below and all of the relevant sections of the statute at issue were discussed and applied.

Petitioner may not rightly complain that the courts ignored a decision where the petitioner failed to cite that decision to the District Court or in its brief to the Circuit Court on appeal.

C. THERE IS NO SPECIAL OR IMPORTANT REASON WHY THIS COURT SHOULD GRANT THIS PETITION BECAUSE NO FEDERAL QUESTION IS INVOLVED AND THERE IS NO CONFLICT BETWEEN THE DECISION HERE AND ANY OTHER DECISION OF THE STATE OR FEDERAL COURTS ON THE QUESTION PRESENTED.

No special or important reasons for the exercise by this Court of its discretion to review this case on a writ of certiorari are present here. No federal question is involved. No conflict between the decision of the courts below and any other decision of any federal court is advanced.

Petitioner merely asserts that the District Court's ruling was "a disregard for the Pennsylvania Superior Court decision of *Gabriel vs. O'Hara*, [supra] . . . ." and that ". . . by ignoring the case of *Gabriel vs. O'Hara*, the District Court and now the panel has violated the principle that a Federal tribunal must give the decisions of state intermediate appellate courts 'proper regard.' " Petition, REASONS FOR GRANTING THE WRIT, p. 3.

The decision referred to is not in conflict with the decision here; the *Gabriel* case held only that the six year rather than the two year period of limitations applied to all of the varied claims which could be made under the state consumer protection law. That holding is not in conflict with the holding in this case that a subrogated claim for contribution or indemnity from other tortfeasors is subject to the four year limitation applicable to contracts implied in law under a separate section of the statute. *See* pages 8-9 *infra*.

The assertion that the courts below ignored the *Gabriel* decision is unfounded; petitioner failed to cite that decision to the District Court and did not cite that decision to the Circuit Court in its Brief on appeal. The *Gabriel* case was not cited until petitioner filed its

Petition for Rehearing, after the Circuit Court had affirmed the entry of judgment.

If petitioner had so little regard for the *Gabriel* case as to fail to cite it before the judgment here was affirmed, this Court should not be asked to intervene and to hold the courts below in violation of the requirement that they afford proper consideration to decisions of the state courts in applying state law for failing to consider what they were not properly asked to consider.

There is, of course, no indication that the Circuit Court panel did not consider the *Gabriel* decision and all the arguments now made by petitioner. Petitioner's argument in this Petition in all of sections 1 through 3, pages 3 through 10, is only a verbatim repetition of the argument in its Petition for Rehearing, and it cannot be assumed that the panel did not consider the Petition for Rehearing before rejecting it.

CONCLUSION

The Circuit Court was correct in affirming the entry of summary judgment by the District Court against petitioner on the ground that the four year period of limitation applicable to contracts implied in law barred petitioner's subrogated claims for contribution to or indemnity for a judgment rendered against the insured more than five years before the commencement of this action. The District Court applied both the Pennsylvania statute and the relevant decisions of the Pennsylvania and federal courts under that statute, and properly considered all of the cases and authorities cited by the parties. Neither the District Court nor the Circuit Court improperly disregarded a relevant decision of the state appellate court where the decision claimed to have been ignored was not relevant and was never cited to the District Court and was not cited to the Circuit Court in the briefs on appeal.

The question sought to be presented involves no federal question, there is no conflict with any decision of a federal or state court, and was correctly decided below. There is therefore no reason why this Court should grant the Writ, and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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MAY 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1597

In The

Supreme Court of the United States

October Term, 1989

GENERAL ACCIDENT FIRE & LIFE ASSURANCE CO.

Petitioner,

vs.

I.T.T. GENERAL CORPORATION
and
ELECTRONICS CORP. OF AMERICA

Respondents.

BRIEF OF RESPONDENT ELECTRONICS CORPORATION OF AMERICA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Are an insurer's subrogated causes of action under Pennsylvania law for contribution and indemnity governed by the four year limitations period contained in Pa.C.S.A. § 5525(4) governing contracts implied in law?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 1

REASONS FOR DENYING THE WRIT 2

I. None of the Considerations Governing Review on Writ of Certiorari is Applicable 2

II. The Lower Courts Gave Proper Regard to the Decisions of Pennsylvania's Intermediate Appellate Courts in Determining the Applicable Statute of Limitations 2

III. The Lower Courts Correctly Applied a Four Year Statute of Limitations to the Petitioner's Subrogated Claims for Indemnity and Contribution 4

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 62 L.Ed. 1188 (1938) 2

Frangos v. Doerling Eq. Corp., 860 F.2d 70 (3d Cir. 1988) 6

Gabriel v. O'Hara, 368 Pa. Super. 383, 534 A.2d 488 (Pa. Super. 1987) 3

Pa. Nat. Mut. Cas. Ins. Co. v. Nicholson, 374 Pa. Super. 13, 544 A.2d 123 (1989), *alloc. denied*, 55 A.2d 116 (Pa. 1988) 5, 6, 7

Thermo King Corp. v. Strick Corp., 467 F. Supp. 75 (W.D.Pa.), *aff'd* 609 F.2d 503 (3d Cir. 1979) 4, 6

STATUTES

42 Pa.C.S.A. § 5525(4) 3, 4, 5, 6

42 Pa.C.S.A. § 5527(6) 4, 5, 6

RULES

Supreme Court Rule 10.5 2

COUNTERSTATEMENT OF THE CASE

The petitioner, as subrogee of its insured, filed suit for indemnity and contribution against the respondents on August 23, 1988, almost five years after judgment was entered against the petitioner's insured in a personal injury action on June 16, 1983. (The insured's appeal was resolved by settlement agreement dated October 7, 1983.) Federal jurisdiction for the petitioner's suit was based upon diversity of jurisdiction.

The district court ruled that the actions were barred by the four year Pennsylvania statute of limitations governing all contracts implied in law, and granted summary judgment. The summary judgment was upheld by the United States Court of Appeals for the Third Circuit; the petitioner's petition for rehearing was denied.

SUMMARY OF THE ARGUMENT

The application of a state statute of limitations to a state-created right of action is not an issue that places this case among the select group of cases in which certiorari discretion should be exercised. No decision reached by the Court would establish a ruling precedent on the issue.

The lower courts' alleged failure to give "proper regard" to rulings of the intermediate appellate courts of Pennsylvania is contradicted by the district court's opinion, and the petitioner's failure to cite to the district court or to the Third Circuit the cases upon which it now relies makes this case inappropriate for a claim of lack of proper regard for state rulings on state law.

The lower courts were correct in ruling that actions for contribution and indemnity are governed in Pennsylvania by a four year statute of limitations.

REASONS FOR DENYING THE WRIT

I. NONE OF THE CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI IS APPLICABLE

Certiorari jurisdiction is exercised only when there are "special and important reasons therefor." Sup.Ct.R. 10.5. None exist in this case.

The issue presented for the Court's decision is whether the Pennsylvania statute of limitations for state-created rights of contribution and indemnity is four years or six years. No federal question is involved. Even if the Court were to devote its energies to addressing this question, its decision would not resolve the issue because determining the applicability of a state statute of limitations to a state-created right of action is a question of state substantive law to be resolved by state courts. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 62 L.Ed. 1188 (1938).

II. THE LOWER COURTS GAVE PROPER REGARD TO THE DECISIONS OF PENNSYLVANIA'S INTERMEDIATE APPELLATE COURTS IN DETERMINING THE APPLICABLE STATUTE OF LIMITATIONS

The petitioner attempts to transform a mundane question about a state statute of limitations into a matter

of federal consequence by charging that the lower courts ignored case law from intermediate appellate courts in Pennsylvania that purportedly supports application of the limitations period the petitioner desires.

The petitioner's charge is contradicted by the district court's opinion, which surveys the limited Pennsylvania case law on the issue and provides a well-reasoned basis for the district court's decision to apply a four year limitations period to the petitioner's suit. Pet. App., pp.6-7. Among other considerations, the district court relied upon the petitioner's *own assertion* that "an action for contribution is 'held to be governed by the statute of limitations applicable to actions based on implied contracts. . . .,' " Pet. App., p.7, which in Pennsylvania is a four year limitations period. 42 Pa.C.S.A. § 5525(4).

The petitioner claims that the lower courts improperly "ignored" the case of *Gabriel v. O'Hara*, 363 Pa. Super. 383, 534 A.2d 488 (Pa. Super. 1987). Pet. for Cert., p.i. The limitations period governing claims for contribution and indemnity are not discussed in *Gabriel*, even by implication. That case deals exclusively with the unique problems of determining the applicable statute of limitations for civil actions alleging violations of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. Thus, the petitioner's assumption that Pennsylvania's intermediate appellate courts had formulated an "explicit standard" is incorrect. Pet. for Cert., p.i. It is impossible to reconcile the petitioner's assertion that *Gabriel* is a controlling precedent with the petitioner's failure to cite that case to the district court or to the Third Circuit in its original submission (the petitioner cited the case for the

first time in a petition for rehearing after the Third Circuit's adverse ruling).

The petitioner's own admission to the lower courts that it was appropriate to apply to these actions the statute of limitations applicable to implied contracts, and the petitioner's lack of diligence in presenting the cases that it now claims were ignored,[1] cause the petitioner's argument that the lower courts "ignored" relevant cases to ring hollow.

III. THE LOWER COURTS CORRECTLY APPLIED A FOUR YEAR STATUTE OF LIMITATIONS TO THE PETITIONER'S SUBROGATED CLAIMS FOR INDEMNITY AND CONTRIBUTION

The petitioner assigns error to the lower courts' finding that its subrogated claims for indemnity and contribution are governed by the four year statute of limitations found in 42 Pa.C.S.A. § 5525(4). The petitioner maintains that the governing statute of limitations is the six year limitations period provided by 42 Pa.C.S.A. § 5527(6). The lower courts' determination was correct and the petitioner's assertions must be dismissed for the reasons set forth below.

Indemnity claims are governed by the statute of limitations applicable to contracts. *Thermo King Corp. v. Strick*

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[1] Only two of the sixteen cases cited in the Petition for Certiorari were relied upon by the petitioner in its original submission to the Third Circuit. Seven of the sixteen cases were not even cited in its Petition for Reconsideration. None of the statutes or rules cited in the Petition for Certiorari appear in the petitioner's original submission to the Third Circuit.

Corp., 467 F. Supp. 75 (W.D. Pa.), *aff'd.* 609 F.2d 503 (3d Cir. 1979). Indeed, the petitioner conceded in its Third Circuit Brief that any rights that it may have against the respondents arise from an "implied contract of indemnity." Petitioner's Third Circuit Brief, p.10. Any "action upon a contract implied in law" such as the petitioner's subrogated indemnity claim "must be commenced within four years. . . ." 42 Pa.C.S.A. § 5525(4).

The six year limitation period proposed by the petitioner is inapplicable on its face; it applies only to actions that are "neither subject to another limitation" nor "excluded from the application of a period of limitation. . . ." 42 Pa.C.S.A. § 5527(6). The present action, based upon an implied contract of indemnity, is specifically addressed in 42 Pa.C.S.A. § 5525(4), and thus is "subject to another limitation."

The petitioner's reliance upon *Pa. Nat. Mut. Cas. Ins. Co. v. Nicholson*, 374 Pa. Super. 13, 544 A.2d 123 (1988), *alloc. denied*, 555 A.2d 116 (Pa. 1988), is misplaced. Though the contribution action in *Nicholson* was governed by the six year limitation period, *Nicholson* is inapposite because the cause of action in *Nicholson* accrued *before* 42 Pa.C.S.A. § 5525 was amended to include contracts implied in law.[2] Before that amendment, contracts

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[2] 42 Pa.C.S.A. § 5525 was amended in June 1978 to include implied contracts, with a one year grace period to June 1979. The *Nicholson* action accrued on September 15, 1977, when judgment was entered against Phillips Construction Company and Nicholson Construction Company. This date was prior to the effective date of the new four year limitations period for implied contracts.

implied in law were not subject to any express limitations period, with the result that they were governed by the six year "catch-all" provision of 42 Pa.C.S.A. § 5527(6). In the present case, there is no question whatever that the petitioner's right to a subrogated claim for indemnity accrued long after the new four year limitations period for implied contracts became effective.

The only authority that the petitioner offers to support its contention that the six year limitation period applies is a footnote in *Frangos v. Doerling Equipment Corp.*, 860 F.2d 70, 74, n.6 (3d Cir. 1988). The only legal authority pertaining to the statute of limitation for a claim of indemnity in the *Frangos* footnote is *Thermo King Corp. v. Strick Corp.*, 467 F. Supp. 75, 77 (W.D. Pa. 1979). Significantly, the *Thermo King Corp.* case was decided prior to effective date of the 1978 amendment of 42 Pa.C.S.A. § 5525 that is discussed above.[3] As a result, *Frangos* suffers the same debility as *Nicholson* as a precedent for the petitioner's position.

At the time that the petitioner's subrogated claim for an implied contract of indemnity accrued, all implied contracts were expressly governed by a four year statute of limitation. 42 Pa.C.S.A. § 5525(4). The petitioner, relying solely upon cases in which the cause of action accrued prior to relevant amendments to the statutes of limitations, fails to demonstrate that a six year limitations period should govern.

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[3] The *Frangos* opinion does not reveal when the plaintiff's action accrued, so there is no way to know whether his cause of action was governed by the pre- or post-amendment limitations periods.

The same considerations govern the petitioner's suit for contribution.[4] Pennsylvania courts have stated that an action for contribution "sounds in contract." *Pa. Nat. Mut. Cas. Ins. Co. v. Nicholson Constr. Co.*, 374 Pa. Super. 13, 18, 544 A.2d 123, 125, *alloc. denied*, 555 A.2d 116 (1988). The petitioner cited to the district court authority that contribution actions are "governed by the statute of limitations applicable to actions based on implied contracts. . . ." Pet. App., p.7. The petitioner has no basis upon which to claim now that the four year Pennsylvania statute of limitations for actions based on implied contracts was improperly applied in this case.

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[4] The petitioner did not raise any objections to the dismissal of its contribution action in its original Third Circuit submission. Its arguments were devoted exclusively to its indemnity action.

CONCLUSION

The petitioner presents for the Court's consideration an unimportant issue of state law upon which this Court cannot render a decisive ruling. The petitioner's arguments will be matters of first impression for the Court because of the petitioner's failure to present them to the lower courts. The case does not merit the attention of the nation's highest court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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